Edison Electric INSTITUTE

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Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554r

Re: Ex Parte Notice: Accelerating Broadband Deployment by Removing Barriers to Infrastructure Investment –
WC Docket No. 17-84

The Edison Electric Institute ("EEI") has supported the Federal Communications Commission's ("FCC" or "Commission") goals of promoting broadband deployment and infrastructure investment for the benefit of consumers and businesses and has filed comments in the above-referenced docket.[1] EEI appreciates the opportunity to now provide feedback to the Commission regarding its recently issued draft Third Report and Order and Declaratory Ruling ("Draft Order") wherein the Commission proposes to adopt not only a new framework for One-Touch Make-Ready ("OTMR") but also a multitude of complex changes to existing pole attachment processes and practices as well a new policy regarding pole attachment agreements between Incumbent Local Exchange Carriers ("ILECs") and electric utilities.

Introduction

EEI is the trade association that represents all U.S. investor-owned electric companies. Collectively, EEI's members provide electricity for 220 million Americans, operate in all 50 states and

[1] See Comments of EEI filed June 15, 2017, in the above-referenced docket; EEI Reply Comments filed July 17, 2018, in the above referenced docket.

the District of Columbia, and directly and indirectly employ more than seven million people in communities across the United States. EEI's members invest more than $100 billion each year to build a smarter energy infrastructure and to transition to even cleaner generation resources. As the owners and operators of a significant portion of the U.S. electricity grid, EEI has filed comments with the Commission in various proceedings affecting the interests of its members who are subject to Commission and state pole attachment jurisdiction. Accordingly, EEI and its members have a strong interest in the Commission's proposals to change its rules and policies related to pole attachments.

The Commission should revise the Draft Order's proposal for a new OTMR regime to avoid undue complexity and administrative burdens.

The Draft Order correctly observes that the electric industry will face hundreds of thousands of new 5G wireless and other attachments to be installed in the future.[2] Moreover, in many areas poles are already crowded with existing attachments. Electric utilities therefore have a strong interest in pole attachment rules that provide them with the tools and incentives necessary to be effective partners in these deployments. EEI therefore supports the Commission's effort to improve and speed the process of preparing poles for new attachments or "make-ready." EEI has urged the Commission to adopt an OTMR policy exclusively for make-ready in the communications space because this type of work does not raise the same level of safety concerns as make-ready work in the electric space.[3]

To that end, EEI supports the decision of the Commission to adopt OTMR approach that is limited to make-ready in the communications space on a pole to solve the problems of coordinating make-ready work with existing attachers, however the Commission should not create a separate OTMR process as proposed in the Draft Order instead of simply incorporating an OTMR approach in

[2] See Draft Order at P 1.
[3] See Comments of EEI at 32; EEI Reply Comments at 21.

the make-ready portions of the existing attachment process under the Commissions rule.[4] By creating a separate OTMR process, the Commission would make the pole attachment process administratively burdensome and overly complicated which may eliminate some of the intended benefits of this policy. Additionally, as discussed further below, the new timelines proposed both for the OTMR process and non-OTMR process are problematic and if the Commission adopts this order, then it should recognize that utilities will require a complete overhaul of existing pole attachment application and power space make-ready construction processes. The Commission must provide utilities with a transition that provides enough time before the rule changes go into effect.

The Draft Order purports that significant time may be saved by placing the responsibility on the new attacher to conduct a survey of the affected poles to determine the make-ready work to be performed and would require new attachers to permit representatives of the utility and existing attachers potentially affected by the proposed work to be present for the survey, using commercially reasonable efforts to provide at least three business days of notice.[5] Unfortunately, this does not strike the right balance between providing sufficient time to accommodate coordination with the utility and existing attachers. In practice, three business days of notice will rarely allow utilities or existing attachers the ability to schedule survey ride-outs.

The Draft Order also places an undue administrative burden on utilities regarding communications to new and existing attachers. For example, the Draft Order requires the utility to "use commercially reasonable efforts to provide at least three business days' advance notice of any surveys to the new attacher and each existing attacher."[6] Instead of requiring the utility itself to act as the clearinghouse for survey-related notices to multiple parties under the OTMR process, the

[4] See Draft Order at P 17.
[5] See id at P 49.
[6] See id at P 76.

Commission should clarify that the new attacher's contractor shall provide such advance notice, unless the utility specifically desires to provide such notices itself.

Although it is appropriate for the Commission to better define when a pole attachment application is complete,[7] the proposed timeline for the utilities review of an application for completeness is overly complicated. The Draft Order proposes that a utility has 10 business days after receipt of pole attachment application in which to determine whether application is complete and notify the attacher of that decision.[8] However, in the case of an incomplete application, Draft Order proposes the attacher may resubmit a supplemented application, but the utility is only afforded 5 business days to re-evaluate the application and provide the attacher with feedback on whether the application is complete or identify the unaddressed deficiencies in the application. In addition to raising concerns that such a short-deadline will undermine safety and reliability interest, to track and process applications under two different deadlines is an administrative burden that seems unjustified. The Commission should provide utilities with the same 10 business day period for review of an initial application and a resubmitted application for completeness.

The Draft Order proposes a 15-day application review period, in which, among other things, the utility is expected to determine if an objection is warranted by a new attacher's simple make-ready determination.[9] The Draft Order is incorrect that 15-days is sufficient because the electric utility will only have three days of notice to accompany the new attacher's contractor on the survey when the contractor makes the simple/complex determination.[10] Again, with only three days of notice for utility

[7] See id. at P 54.
[8] See Draft Order at P 56.
[9] See Draft Order at P 51.
[10] The Commission also should clarify that pole replacements constitute "complex" make-ready work For example, the Draft Order states that the Commission "interpret[s] the definition of complex make-ready to include all pole replacements as well," therefore pole replacements should also be referenced in the proposed amendment to 47 C.F.R. § 1.1402(p). Id. at P 18

to accompany the new attacher's contractor for the survey, in practice this will rarely occur and there is no guarantee the utility will have sufficient time to have the information it needs to determine whether to object to the contractor's determination before the deadline. The 15-day application review period also does not provide a mechanism by which a new attacher may be made aware if the poles it selected are already subject to a pre-existing pole attachment application. The proposed rule does not account for how to address multiple or overlapping pole orders and as a result it seems likely that in many instances after a new attacher spends time, money and resources to complete the survey, it may have to change its request because of a pre-existing application. Accordingly, even with the new attacher assuming the responsibility of conducting surveys and providing notices to utilities and existing attachers, 15-days is not appropriate and the Commission should instead allow a utility to decide whether to grant a complete application in in 30-days for standard OTMR requests and 45-days for larger OTMR requests.[11]

The Draft Order appropriately proposes that the OTMR process should include time for post-make-ready inspections and the repair of any defective make-ready work. However, the Draft Order's proposal for post-inspection repair is problematic.[12] The Commission proposes that a new attacher must give notice to the utility and existing attachers within 15-days after the new attacher has completed OTMR work on a particular pole and new attachers must provide the utility and existing attachers with at least 30-days for the inspection of make-ready work performed by the new attacher's contractor and provide notice to the new attacher of needed repair work within 14-days after any post-make-ready inspection.[13] The Draft Order appears to further contemplate that the utility or existing attachers can either complete any necessary remedial work and bill the attacher for reasonable costs or

[11] See id at P 58.
[12] See Draft Order at P 64.
[13] See id. at P 65.

require the new attacher to fix "the damage caused to their own equipment by the new attacher's make ready work" at its expense within the 14-days following notice from the utility or existing attacher.[14]

To facilitate repairs of make-ready work performed by the new attacher's contractors, the Commission should clarify that utilities are not limited to only being able to report damage to their own equipment. More often the problems are related to make-ready work that has not been constructed as designed or that violates applicable law, safety codes or construction standards.[15] Additionally, this proposed rule does not provide for any further review of the issues found during post-make-ready inspections. If the issues found during a post-make-ready inspection are reported back to the new attacher, then the new attacher gets 14-days to fix the "damage," but the proposed rule would not afford the utility and existing attachers any review of that repair work which presents a risk to safety and reliability. To ensure safety and reliability, utilities and existing attachers need the flexibility to conduct re-inspections to make sure the work was completed according to design requirement.

The Commission should also clarify the allocation of responsibility for the costs of simple make-ready work. In its prior decisions,[16] the Commission has held that new attachers are not responsible for the costs of repairing preexisting violations of safety or pole owner construction standards discovered during the pole attachment process. However, under the proposed OTMR framework, a new attacher's contractor would proceed to perform "simple" make-ready work (including correction of preexisting violations that are within the scope of "simple" repairs) without prior notice to the utility and without an adequate opportunity for the utility to evaluate or context the

[14] See id.
[15] The consequence of improper construction and installation, that does not cause violations, often results in inefficient use of available space on the pole. When new attachers request access in the future, work that could have been avoided will be required, increasing costs and delaying the new attachers project.
[16] See Draft Order at PP 3 and 112.

allegations of pre-existing violations. The Commission should clarify that if a new attacher utilizes the OTMR process and performs "simple" make-ready work that corrects pre-existing violations, the new attacher may not then charge the utility for those simple repairs.

In absence of making such changes to the proposed OTMR framework as discussed above, the complexity of Draft Order's OTMR proposal will likely result in new attachers ultimately deciding not to use OTMR and resorting to the Draft Order's proposed non-OTMR process even for simple make-ready in the communications space. Thus, the new OTMR process may not ultimately serve the Commission's goals to accelerate broadband deployments by shifting most of attachments governed by federal law to the OTMR framework. To the contrary, it seems more likely the clear majority of pole attachments will be handled through the non-OTMR process, which with the Draft Order's proposed reductions to existing power space make-ready time frames will result in an even greater strain on utilities' ability to conduct timely and cost-effective make-ready work without impinging on the utilities' ability to deliver safe, reliable and affordable power to the public. Again, if the Commission adopts this order, even with making the types of changes suggested by EEI and it member companies, then it should recognize that utilities will require a complete overhaul of existing pole attachment application and power space make-ready construction processes and must have enough time to prepare before the rule changes go into effect.

The Commission should not adopt a self-help remedy for the electric space.

Given the complexity of the proposed rules, EEI expects that a minority of new pole attachers will take advantage of the proposed OTMR for simple make-ready in the communications space with the result that electric utilities will process the majority of pole attachment applications under the non-OTMR rules. Given this situation, if the Commission adopts the Draft Order proposal to reduce from 90 to 60-days the make-ready deadlines for all attachments under its non-OTMR rules without regard

to utilities' obligations to perform storm or emergency electric service restoration efforts, then it is more likely that self-help in the electric space will be triggered under the Draft Order's proposed rules.

EEI continues to emphasize that the safety of the workers and the public and the reliability of its member companies' infrastructure must be the paramount priority in considering any changes to the Commission's pole attachment policies. It is critical that the Commission remain focused on the potential impact of its regulations on the reliability and security of the electricity grid and customers. Public safety is also an important factor to consider given the real prospects for serious injuries when work is performed near electric lines. For the electric industry safety is the top priority and the industry works very hard to prevent injuries to workers and the public. The Commission should therefore not adopt the Draft Order's proposal to modify the Commission's rules to provide a self-help remedy for work above the communication space.[17]

It cannot be repeated enough that work conducted in the electric space is substantially more dangerous than work performed in the communications space and to that end, substantially higher qualifications are required for electric linemen. The Commission's proposal to allow utility approved contractors hired by new attachers who are not familiar with a utility's electric distribution system presents an unreasonable risk to life, health, and safety of the workers and the public. Although the Draft Order states that the Commission recognizes the "valid concerns of utilities regarding the importance of safety and equipment integrity,[18]" the steps proposed to address these important issues are inadequate to sufficiently mitigate the risk presented by allowing self-help in the electric space by third-party contractors.

[17] See Draft Order at P 90.
[18] See id at P 93.

Regardless of the Commission's requirement that a new attacher must use a utility-approved contractor, provide utilities with completion notice and opportunity for post-construction inspection, new attacher directed contractors to performing work in the electric space would still present undue risks to safety and reliability. These proposals do not cure the significant risk that third-party contactors will not know electric company standards which often exceed minimum standards such as OSHA and the NESC. Moreover, these proposals do not account for the risk that the utility-approved contractor crew being brought into a new electric system and assigned to the project will have sufficient knowledge of the utility's electric system, policies and procedures.

The Draft Order's proposal will also undermine safety and reliability because it does not provide any method for utilities to have the necessary visibility of all work on its system all times. In absence of careful coordination, this rule would threaten electric reliability through unplanned forced outages that may be caused by make-ready work in the electric space. Unplanned outages and reduced notice of scheduled outages due to lack of coordination by telecommunications attachers and their utility-approved contractors have the potential not only to adversely impact important safety concerns but also may cause economic harm to communities because of electric service outages.

In sum, limiting the self-help remedy offered under the Commission's rules to simple make-ready work in the communications space preserves needed safety standards and allows attachers to more quickly and cost effectively use communications line workers, certified to work in the communications space work. Electric utilities must continue to exercise exclusive control over the electric supply space on their poles. If the Commission feels strongly that a self-help remedy in the supply space is necessary, it should issue a Further Notice of Proposed Rulemaking on this issue and allow all interested parties to develop a robust and precise record on the issue. This would allow any

future rule to provide more limited parameters around such a remedy, given the risk to safety and reliability.

To maintain safety and reliability, utilities should have a right to stop all work on poles until all pre-existing conditions are corrected.

EEI opposes the Draft Order's clarification that utilities may not deny new attachers access to the pole based on safety concerns arising from a pre-existing violation.[19] In situations where a pre-existing condition presents a threat to the safety of a pole, the pole owner should have the right to stop all work on the pole until the pre-existing condition is resolved. Neither workers nor the public should be put at risk. To balance the objectives of preserving safety and reliability and promoting expeditious deployments of broadband, the Commission should require existing attachers to pay their power make-ready costs and do their communications space make-ready and permit a utility pole owner to stop work on its pole upon providing the new attacher documentation of a violation or pre-existing safety or reliability hazard. Utilities could be encouraged to coordinate with new attachers to provide project specific timelines for correcting violations to provide new attachers with better certainty for project planning. In this approach, the Commission would not sacrifice safety and new attachers would gain more business certainty.

The Commission should not require utilities to provide pole-by-pole estimates and manage invoicing of existing attacher costs.

The Commission's proposal to require utilities to provide detailed make-ready cost estimates and post-make-ready invoices is problematic and would likely increase costs for new attachers without any associated benefit.[20] Specifically, the Draft Orders' proposal requiring utilities to provide estimates of existing attachers' costs is currently infeasible and will require additional staffing and time

[19] See Draft Order at P 113.
[20] See Draft Order at P 101.

with the result of additional costs to the new attacher. Typically, contractors do not charge on a pole-by-pole basis so a better solution would be for the Commission to clarify that utilities may average the estimated total costs and apportion them by pole.

The Commission's proposed clarification that an electric utility is required to provide estimates for all make-ready work to be completed, whether a communications or power space make-ready is infeasible.[21] The Draft Order's assumption that utilities are in the best position to provide estimates of existing attachers' communications space work costs based on past project experience with existing attachers is flawed. This assumption is irrational because utilities do not have this information and they are not involved in the communications space make-ready process. Instead, since new attachers would now have the obligation to reach out to existing attachers for a variety of purposes, the responsibility should be on new attachers to obtain such estimates from the existing attachers. Moreover, the new attacher may already use some of the same contractors as existing attachers and should know these costs.

The Draft Order's proposal for final invoices for power space make-ready work based on actual make-ready charges is similarly problematic and utilities should not be required to invoice the make-ready costs of existing attachers.[22] Utilities will have little or no control over the contractors used by existing attachers and cannot pass judgement on the validity of their costs. For example, if an existing contractor's final make-ready charges exceed the initial estimate provided by the pole owner, it would be impossible for the pole owner (rather than the contractor) to document the reason for such overages. Moreover, the Draft Order's proposal for utilities to provide the new attacher with a detailed final invoice of the actual make-ready charges incurred on a pole-by-pole basis to accommodate the new

[21] See id at P 103.
[22] See id at P 104

attachment presents similar problems to those presented by the Draft Order's proposed approach to cost estimates. As noted above, contractors do not provide pole-by-pole bills, thus they must invoice attachers on either an aggregated basis or one which apportions pole costs based on a simple division (i.e. total costs divided by the number of poles). The Draft Order should clarify that where the utility determines that make-ready charges did not vary from pole-to-pole or where make-ready is performed on a flat rate basis, the utility may aggregate individual charges rather than present a pole-by-pole invoice for those charges.

The Commission should adopt the Draft Order proposal for overlashing

EEI supports the Commission's proposal to allow utilities to adopt procedural requirements on overlashing for existing attachers.[23] Given the purported importance of overlashing in expediting broadband deployments and the anticipated growth of overlashing, it is important for utilities to be able to establish reasonable pre-notification requirements such as the requirement that attachers provide a minimum of 15-days advanced notice of overlashing work.[24]

The Draft Order appropriately provides a pole owner, upon notice, an opportunity to reject, or require modifications to any proposed overlash that would exceed the pole's capacity, would be inconsistent with generally applicable engineering practices or would compromise the pole's safety or reliability,.[25] It is also reasonable that any utility that elects to establish an advance notice requirement must first provide advance notice to attachers or include the requirement in its pole attachment agreements. For an example it would be appropriate for a utility to establish in its advance notice requirements that the notice of overlash does not relieve the overlasher of doing the proper engineering associated with adding load to a structure and providing evidence of that calculation to the pole owner

[23] See Draft Order at P 107.
[24] See id at P 108.
[25] See Draft Order at P 108.

if requested. By this notice approach, the Draft Order's proposal strikes a balance between promoting faster, less expensive broadband deployments while addressing important safety concerns relating to overlashing.

However, given the anticipated large number of poles that will be subject to overlashing, the Draft Order would make it practically impossible for utilities to schedule and complete an adequate engineering evaluation of each pole within the proposed 15-day period. If the Commission adopts the proposed OTMR framework, the Commission should make clear that proposed overlashing must utilize the OTMR process or the existing application process if there is any complex make-ready work. Otherwise, the Commission would perpetuate two inconsistent approaches: one (using the existing application procedure or the OTMR process) that utilizes pole surveys and engineering analyses to ensure the safety of poles after any attachment (including overlashing), and one that dispenses with any survey or engineering analysis unless the utility scrambles, at its own expense, to perform such survey and analysis within a compressed 15-day period. Among other things, if an attacher proposes to install a new cable on utility poles, the effect on pole loading is largely the same regardless of whether the new cable is installed on its own or is overlashed on an existing, decades-old cable — so it is appropriate to require the attacher to procure the same pole-loading analysis whether or not the attacher owns an existing attachment on the same poles. Making all overlashing subject to the OTMR process or the existing application process would strike an appropriate balance between promoting faster, less expensive broadband deployments while addressing important safety concerns relating to overlashing.

To the extent, if any, that the Commission may elect to preserve the "overlashing exemption" that authorizes attachers to install overlashed cables without first obtaining any pole survey or engineering analysis, the Commission should clarify that such exception is applicable only to "cable-on-cable" overlashing. In recent years, attachers and their suppliers have developed various types of

wireless-capable attachments that are either (a) "in line" and integrated with the cable that supports them, or (b) designed to be suspended from an existing communications cable between utility poles. Future developments could lead to additional attachment-types, wireless or otherwise, that are designed to be added to or suspended from existing communications cables. EEI believes that the Commission did not intend for the "overlashing exception" to allow the installation of novel types of attachments, beyond ordinary "cable-on-cable" overlashing, without utilizing the full pole-attachment application process that includes an adequate pole survey and engineering analysis.

EEI appreciates the Draft Order's underlying rationale that ILECs should pay the same rates at telecommunications service providers in newly-negotiated pole attachment agreements.

EEI has consistently taken the position in comments to the Commission that adopting a pole attachment formula for ILECs benefits ILECs at the expense of utilities and utility rate payers and would reduce utility and ILEC interest in beneficial joint use agreements.[26] Moreover, EEI disagrees with the Draft Order's premise that electric utilities owning more poles affords utilities with more bargaining power in negotiations with ILECs because electric utilities are typically stuck with their ILEC counterparts given they cannot remove existing ILEC attachments even if joint use agreements terminates.[27] Nevertheless, EEI appreciates the Commission underlying rationale for the Draft Order proposal to allow ILECs to enter into new pole attachment agreements with electric companies at comparable rates, terms and conditions to other similarly-situated cable and telecommunications attachers.[28]

Although less than ideal from the perspective of the electric industry, the Draft Order's proposal to establish a rebuttable presumption to extend to ILECs comparable attachment rates, terms

[26] See Comments of EEI at 44-46.
[27] See EEI Reply Comments at 16.
[28] See Draft Order at P 114.

and conditions for new agreements does offer a solution. As EEI and its member companies have repeatedly articulated to the Commission, negotiated joint use agreements between electric utilities and ILECs are fundamentally different from the pole license agreements that are typically offered to cable service providers and competitive local exchange carriers under Section 224. Specifically, joint use agreements confer upon ILECs, as joint pole owners, a myriad of other benefits that save time and expense.[29] EEI also agrees with the Draft Order's determination that the Commission should not extend this rebuttable presumption to existing joint use agreements between utilities and ILECs because it would unreasonably disrupt joint use relationships between electric utilities and ILECs.[30] Additionally, granting a presumption that ILECs should receive the lower telecom rate under a joint use or joint ownership contract would afford ILECS with an unfair advantage against competing attachers that do not receive the additional benefits of utility/ILEC joint ownership agreements.

Respectfully submitted,

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[29] See EEI Comments at 44-46.
[30] See Draft Order at P 118.